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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

-vs-

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, CONNECTICUT, MISSOURI, NORTH CAROLINA, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS, AMICI CURIAE

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QUESTIONS PRESENTED

1. Do the states have a compelling interest in the regulation of public nudity?

2. Is Indiana's Public Indecency statute a valid time, place and manner regulation?

3. Are the restrictions on First Amendment freedoms incidental?

4. Does the Seventh Circuit's decision conflict with applicable decisions of this Court?

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INTRODUCTION

The States joining in this brief all have similar or related "indecent exposure" or "public indecency" statutes, ordinances, or regulations. Because the United States Court of Appeals for the Seventh Circuit's opinion in this case is so broad and far-reaching -- starting down the road to a possible constitutional challenge of their own statutes -- these parties have filed a joint brief urging the Court to reverse the lower court's decision.

It is the position of the States that they have a compelling interest in the regulation of public nudity -- an interest recognized at common law and with continuing validity -- by means of "indecent exposure" or "public indecency" laws. Further, that these laws are directed at conduct, not speech,

and that the type of nude "dancing" at issue in this case does not present a sufficient communication element to bring the First Amendment into play. In the alternative, if the Court finds that the conduct here does involve expressive activity or speech, that public nudity may still be constitutionally proscribed pursuant to Renton v. Playtime Theatres, 475 U.S. 41 (1986), as a valid "time, place, and manner" regulation or pursuant to United States v. O'Brien, 391 U.S. 367 (1968), as incidental restrictions furthering an important state interest. In any event, the States urge the reversal of the Seventh Circuit's decision in Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), and that the Indiana public indecency statute, Section 35-45-4-1, be declared constitutional.

ARGUMENTS

I. THE STATES HAVE A COMPELLING INTEREST IN THE REGULATION OF PUBLIC NUDITY.

A. Indiana Code Section 35-45-4-1 Is Plain And Unambiguous, And Legislative History Is Thus Unnecessary.

The States' interests in regulating or proscribing public nudity are numerous and obvious. In fact, so numerous and obvious that it is surprising that the Seventh Circuit questioned the purpose of the Indiana "public indecency" statute. The statute under review in this case, Indiana Code Section 35-45-4-1, provides in pertinent part:

> a) A person who knowingly or intentionally, in a public place:
>
> 1) engages in sexual intercourse;
>
> 2) engages in deviate sexual conduct;
>
> 3) appears in a state of nudity; or

4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor;

b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Both the majority opinion and Judge Posner's concurrence question and complain about the absence of any legislative history in support of this statute. Miller v. Civil City of South Bend, 904 F.2d 1081, 1088, 1100. However, legislative history is only relevant and necessary "if the statutory language is unclear." Blum v. Stenson, 465 U.S. 886, 896 (1984).

The intention of a legislature is to be ascertained primarily from the language used in the statute. A. Magnano Co. v.

Hamilton, 292 U.S. 40, 46 (1934). Where the language of a statute is plain and unambiguous, there is no need to look for legislative purpose or history. Ex parte Collett, 337 U.S. 55 (1949). As the Court said in Collett:

> The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 89 L.Ed. 921, 933, 65 S.Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions.

See also, TVA v. Hill, 437 U.S. 153, 184 fn 29 (1978). Thus, since Indiana Code Section 35-45-4-1 is "plain and unambiguous" -- proscribing acts of sexual intercourse or deviate sexual conduct, or appearing nude, in public --

the Seventh Circuit's concerns are unwarranted. The Indiana legislature, by the clear, unequivocal language of the statute, wished to outlaw nudity and sex acts in public. Legislative history is irrelevant and unnecessary. Tr. of Iron Wkrs. L. 473 P. Tr. v. Allied Products, 872 F.2d 208, 212-13 (7th Cir. 1989). The plain language of the statute is the best evidence of its meaning. Meredith v. Bowen, 833 F.2d 650, 654 (7th Cir. 1987).

B. Public Nudity Is Conduct And A Proper Subject Of A State's Police Power.

Conduct is not protected by the First Amendment of the Constitution. Nudity, in and of itself, is clearly conduct and has traditionally been subject to the police power of the State. City of Portland v. Derrington, 451 P.2d 111, cert. denied, 396 U.S. 901 (1969);

Koppinger v. City of Fairmont, 248 N.W.2d 708, 711 (Minn. 1976). Nudity was a traditional common-law crime, an act malum in se. LeRoy v. Sidley, 82 Eng. Reprint 1036 (1663); Truet v. State, 57 So. 512 (Ala. Ct. App. 1912). Also, indecent exposure and particular acts and forms of lewdness or gross indecency with respect to sexual relations constituted criminal offenses at common law. State v. Romero, 710 P.2d 99, 101 (N.M. Ct. App. 1985); Annot., 96 ALR3d 692, 693 (1979).

Section 35-45-4-1 of the Indiana Code is directed at conduct, and to that degree, it is fully constitutional and in line with the common law prohibition against public nudity. However, the question becomes: once music is turned on in the background, does conduct which is constitutionally unprotected become of

sufficient communicative content to warrant the protection of the First Amendment? Numerous state courts have answered that question with a "no" and have held that nude "dancing" of the variety at issue in this case -- "barroom", "go-go", "strip-tease" -- is not protected.[1]

These courts have recognized that there is not a sufficient communicative element involved in barroom "dancing" or "entertainment" to bring into play the First Amendment. Rather, the courts realized that it is simply another commercial exploitation of sex and "that such conduct is nothing more than a sales gimmick." Crownover v. Musick, 509 P.2d

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1. These state supreme courts are Arkansas, Florida, Indiana, Louisiana, Maine, Michigan, Nebraska, Oregon and Tennessee.

497, 511 (Ca. 1973). As the Oregon Supreme Court stated:

> When nudity is employed as sales promotion in . . . restaurants, nudity is conduct. As conduct, the nudity of employees is a fit subject for governmental regulation . . .

City of Portland v. Derrington, 451 P.2d at 113. See also, Hoffman v. Carson, 250 So.2d 891 (Fla. 1971).

These courts have further recognized that although "it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved," that the type of conduct involved here did "not rise to the level of a First Amendment claim." State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979). Similarly, in Birkenshaw v. Haley, 409 F. Supp. 13, 18 (E.D. Mich., S.D. 1974), the court stated:

> It is equally clear, on the other hand, that not all forms of nude or semi-nude behavior are embodied with sufficient communicative content to warrant the protection of the First Amendment. A modern-day streaker, crying "free speech", will find no sympathetic chord in the Constitution.

In California v. LaRue, 409 U.S. 109 (1972), this Court recognized the same principle:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action,' Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). In O'Brien, supra, [U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672], the court suggested that the extent to which 'conduct' was protected by the First Amendment depended on the presence of a 'communicative element,' and stated:

> 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' 391 U.S. at 376.

409 U.S. at 117-18. This distinction is made clear in Starshock v. Shusted, 370 F. Supp. 506, 508 (D.C.N.Y. 1974), in which the court considered a particular form of entertainment offered by a local nightspot:

> Plaintiffs argue that the activities in question are an art form, and hence, may not be suppressed. It is urged that the performers' gyrations are interpretations of the accompanying music, and that they are communicating certain ideas of freedom to the assembled throng. It is asserted that this method of expression is a form of speech warranting the protection of the First Amendment.
>
> While this assertion may be valid in other circumstances, this court finds that in relation to the performance as presented, it is without merit. Plaintiffs fail in their argument to note the significant distinction between

> speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather, these acts are conduct cognizable as a crime under the common law. (Citations omitted.)

In addition, the Supreme Court of Tennessee has reached the same conclusion in City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983), wherein the court stated:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection.

645 S.W.2d at 403. As in the instant case and Baysinger, the dancers in McCoy made no claim that their conduct involved any speech or expression of ideas entitled to First Amendment protection. Rather, "they claim that they make less money appearing scantily clad than they

make when they appear nude." Baysinger, 397 N.E.2d at 587.

In Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971) the Florida Supreme Court reached the same conclusion. A "go-go dancer" challenged the Florida statute making it a crime to expose sexual organs or appear nude in public. The statute was not limited to the distribution of alcoholic beverages. The "dancer" claimed that the statute was unconstitutional as applied to her "since she was engaged in an artistic endeavor . . . (and) that her actions are interpretations of accompanying music, and that this is her means of communicating her ideas of freedom to the assembled patrons of the lounge."[2]

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2. This should again be contrasted to the respondents' admission that they were not attempting to convey any message to the viewing patrons. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 418 (N.D. Ind. 1988).

Id. at 893. The court disagreed with the plaintiff and held that the statute was directed at conduct, that the "dance" did not contain a sufficient expressive element to arise to a First Amendment claim, and even if it had, under an United States v. O'Brien, 391 U.S. 367 (1968), analysis, the infringement was incidental:

> The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla.Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law (e.g. Commonwealth v. Broadland, 315 Mass. 20, 51 N.E.2d 961 (1943); Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952)), and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature. See State ex rel. Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333 (1956), appeal dismissed, 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d 82.

* * * *

We find that appellant's performance falls short of presenting a 'speech' issue sufficiently important to outweigh the State's interest in curtailing lascivious exposure in public places. Contributing to this conclusion is the fact that appellant admits that she usually was tipped a certain amount for removing her brassiere and was tipped an additional substantial sum for removing her pants. The trial judge found that:

'Apparently the spontaneity of her 'self-expression' was in direct proportion to the monetary consideration she received from the barflies rather than from her absorption in the artistry of her dance.'

Hoffman, 250 So. 2d at 893-94. (Emphasis added.)

Other courts have reached the same result. In Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976), the plaintiff argued that the Texas statutes of "indecent exposure" and "disorderly conduct" could not be "applied to her

nude barroom performance, because of its expressive content..." Id. at 1105. The court was not impressed and noted that "the statutes in question are primarily directed at conduct..." and

> it is difficult to conceive of ideas entitled to First Amendment protection which can be solely -- or even best -- expressed by baring the anus or genitals in the circumstances forbidden by the statutes.

Id. (Emphasis added.)

Another court addressed a similar ordinance and claim of unconstitutionality in People v. Karns, 365 N.Y.S.2d 725 (1975). In challenging an ordinance of the City of Rochester, New York, the defendants claimed that their activities -- dancing in the nude -- were protected by the rights afforded under the First Amendment of the Constitution, relying on Salem Inn v. Frank, 501 F.2d 18 (2nd Cir.

1974). The court came to a different conclusion, however:

> It would seem that these arguments proposed by the court will retain little if any validity when coupled with the pronouncements contained in the Roth v. United States case cited previously. [354 U.S. 476 (1957)] In the Roth case (supra), the court went into the historical aspect of the First Amendment and the ratification by the sovereign states, and stated that despite the ratification, the states contained to themselves certain rights of action which seemingly fell under the broad wording of that same Amendment and as evidence of this the court, 354 U.S. at page 483, states:
>
> 'In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.' (Emphasis added).

What the court in Salem Inn (supra) has stated is that dancing, by judicial interpretation is a form of speech or communication, but has failed to adopt the more accepted rule that even certain forms of speech must give way to the greater good.

* * * *

Clearly, dancing of a certain type as opposed to another, is not one of judicial interpretation and more easily reconciled with personal indications or belief. No doubt some individuals of different social standing may regard the productions 'Hair' or 'Ballet African' to be highly offensive and obscene, while others of the same strata may not. Albeit, it clearly comes under the heading of personal taste. It would seem that by interpretation, the courts in Salem Inn (supra) have adopted an attitude of judging all dancing as a legal form of communication, which this court is quite sure was not the intent. By the wildest stretch of one's imagination it is hardly conceivable that our forefathers (the framers of the Constitution) or our Supreme Court of the United States, by judicial interpretation, have as yet formulated dancing in the nude to be a form of expression.

Since the court in Salem Inn (supra) was silent as to the states' rights regarding regulation, it is only fair to point out that those regulatory powers afforded to the separate states were determined inviolate under the Ninth and Tenth Amendments to the Constitution, so long as it did not clearly violate the rights afforded under the other Amendments (here First and Fourteenth).

Karns, 365 N.Y.S.2d at 731-32. (Emphasis in original.)

The court went on to conclude in upholding the ordinance:

> The sum total of the Salem Inn case (supra) at best can be determined as a case elongating freedom of speech to include dancing, but hardly can it be determined to mean that 'nudity' coupled with dancing is such a protected right. All forms of speech and the content therein (here dancing as a form of expression or speech) were never intended by the framers of the Constitution or our Supreme Court of the United States as a protected right in deference to the greater good necessary to protect society. This proposition is firmly stated in the case of Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, wherein the court at pages 57 and 58, 93 S.Ct. at page 2635 stated:
>
> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passerby. Rights and interests 'other than those of the advocates

> are involved.' Breard v. Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 932, 95 L.Ed. 1233 (1950). These interests of the public in the equality of life and the total community environment, the tone of the commerce in the great city centers, and, possibly the public safety itself. . . . ' (Emphasis added.)

365 N.Y.S.2d at 733-34. (Emphasis in original.)

Finally, in Alexander v. Severson, 408 N.W.2d 195 (Minn. Ct. App. 1987), the court addressed a factual situation very similar to the findings of fact by the District Court concerning Glen Theatre, Inc.'s business (the Chippewa Bookstore), in that, the "dancing" consisted of a nude or semi-nude body of a female displayed through glass panels. Glen Theatre, 695 F. Supp. at 419. Like the Chippewa Bookstore, customers would sit in a booth and insert coins in a timing mechanism. The distribution of alcohol was not at issue.

Like the "dancers" in the present case, the "dancers" in Alexander testified "that the primary purposes of their performances were to sexually arouse their male viewers and earn monetary compensation, either from their employer or in the form of 'tips' from customers." Alexander v. Severson, 408 N.W.2d at 197.[3]

The court found that no communicative element existed and, therefore the activity was not protected by the First Amendment. Id. at 199. In so finding,

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3. This is not unlike the "purpose" or "message" found in pandering cases or the prurient interest prong of the Miller test in an obscenity prosecution. "To the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech', it may contain a message that nonetheless is categorically unprotected by the First Amendment -- that is, an appeal to the prurient interest." Walker v. City of Kansas City, Mo., 911 F.2d 80, 87 (8th Cir. 1990).

the court stated that public nudity does not become a constitutionally protected activity "unless it comes 'within the narrow confines of legitimate artistic expression or performance' . . . None of the ["dancers'"] deposition testimony suggested an attempt to convey ideas or that their performances were conducted for artistic purposes." Id.

Courts have continuously found -- and been able to clearly distinguish -- the difference between public nudity as a part of a large artistic production (and thus deserving of constitutionally protection) and public nude "barroom dancing" -- striptease, go-go -- which does not contain an expressive element (and thus is not protected by the First Amendment). The activities of the "dancers" here certainly fall within the latter classification and warrant no protection.

C. <u>The Governmental Interest In Proscribing Nudity Is Substantial And Compelling</u>.

The numerous courts that have addressed the issue of public nudity have recognized the substantial and compelling interest of the state in regulating and proscribing it. These well-recognized interests range from the general interests of preserving "order and morality" to the specific ones of sexual assault prevention. All of these interests standing alone are sufficient to support the regulation. The State of Indiana was entitled to rely on the experiences of others and the findings summarized in other cases in enacting their "public indecency" law. <u>Renton v. Playtime Theatres</u>, 475 U.S. 41, 51 (1986).

In upholding the prohibition against public nudity, including nude "barroom dancing" as found in this case, the

courts have consistently found a valid exercise of the state's police power, based on various legitimate governmental interest: concern for public morals;[4]

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4. Crownover v. Musick, 509 P.2d 497 (Ca. 1973) ("... it cannot be doubted that the governmental entities in the instant cases have the inherent constitutional power to regulate nude conduct in bars, restaurants, and other public places. It is clear that such regulations are justified by considerations of public morals and general welfare.").

Curtis v. City of Seattle, 639 P.2d 1370, 1375 (Wash. 1982) ("Cities in our state have the power to regulate activity such as public nudity. Such regulations are justified by considerations of public morals and general welfare, both incident to the general 'police powers' of municipalities." (J. Stafford concurring.)).

Yauch v. State, 514 P.2d 709, 711 (Ariz. 1973) ("The evil sought to be suppressed is not only the infliction of nudity upon a beholder's moral sensibilities...").

protecting societal norms;[5] preservation of public decency;[6] promotion of general welfare, discipline, "peace and good order";[7] prevention of degradation

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5. State v. Turner, 382 N.W.2d 252, 254-55 (Minn. Ct. App. 1986) ("The park board enacted (the ordinance) to further what the park board perceived to be a legitimate governmental interest, protecting societal norms. . . . Protection of society's norms is a legitimate legislative goal.").

6. Turner, 382 N.W.2d at 255 ("The trial court found that (the ordinance) advances a legitimate governmental interest in the preservation of public decency and order. We concur.").

7. Board of County Commissioners of Lee County v. Dexterhouse, 348 So. 2d 916 (Fla. App. 1977) ((Prohibiting public nudity promotes) "discipline and good order of persons while in establishments...").

Curtis, 639 P.2d at 1375 ("The courts below determined as much, the municipal court stating that this ordinance concerned a 'clear and important governmental interest in the welfare and morals of the public and in maintaining peace and good order in the city.'

These regulations 'reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" (Citations omitted. J. Stafford concurring.)).

of person exposed;[8] prevention of prostitution and pandering;[9] preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct attendant thereto;[10] controlling sites

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8. Yauch, 514 P.2d at 711 ("The evil to be suppressed is...the public degradation and debasement of the individual exposed.").

9. Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1056, 1059 (9th Cir. 1986) ("Law enforcement officials from Kitsap and surrounding counties testified that 'soft drink, topless dancing' establishments in adjacent counties were the sites of crime problems such as prostitution and drug dealing.... The County has a legitimate and substantial interest in preventing social problems that accompany erotic dance studios and threaten the well-being of the community.").

10. Koppinger v. City of Fairmont, 248 N.W.2d 708, 711 (Minn. 1976) ("In addition to these moral interests, the city may have further valid interests in preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct attendant thereto."). (cont'd)

of crime problems, such as, drug dealing and other illegal conduct;[11] and concern

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(No. 10 cont'd)

In case after case, the courts have noted the "disorderly conduct" associated with the nude "dancing" establishments. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983) ("After performing the dance each defendant went to a different table and each defendant was observed allowing a male patron to fondle her breasts."); O'Day v. King County, 749 P.2d 142, 145 fn.2 (Wash. 1988) ("Respondent . . . was charged . . . for allegedly performing a table dance during which she exposed her breasts below the areola, rubbing the same against a customer's face, exposed her pubic hair, touched the genital area of a customer, an performed an act simulating oral sex.

"Respondent . . . was charged . . . for allegedly performing a dance during which she sat on a customer's lap, rubbed her buttocks up and down against the customer's genital area, simulating sexual intercourse, and rubbed her breasts against the customer's face.

"Respondent . . . was charged . . . for allegedly performing a table dance during which she rubbed her buttocks on a customer's legs, exposed her pubic hair and performed an act simulating oral sex.

"Respondent . . . was charged . . . for allegedly performing a table dance during which she exposed her breasts below the areola, exposed her pubic hair and vaginal area, rubbed her breasts against a customer's hands and face, and rubbed her legs and chest against a

for sexual discrimination.[12]

All of these are legitimate governmental interests, compelling or

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(No. 10 cont'd)
customer's genital area."); and Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982) ("The record in the instant case contains the stipulated purpose and believed effect of the ordinance, the deposition of Police Chief Roger Wicker and a fifty-two page listing of the police calls made to and around the Booby Trap between May 6, 1977 and October 31, 1979. The stipulation is essentially equivalent to the "findings" relied on in Bellanca. The report of police calls reveals that many of the activities occurring in and around the Booby Trap were of the same nature and severity as those cited by the Court in LaRue, including prostitution (in some instances by the female dancers), indecent exposure, rape, and numerous assaults. The testimony of Police Chief Wicker provides the necessary linkage between the stipulated purpose of the ordinance and the problems allegedly justifying it."). See also California v. LaRue, 409 U.S. 109 (1972), and New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

11. Key, 793 F.2d at 1056, 1059 ("the sites of crime problems such as . . . drug dealing, prostitution, and other social ills..."); see also Grand Faloon Tavern, Inc., 670 F.2d at 949-51.

substantial in nature. The Seventh Circuit expressed concern that this

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12. Crownover v. Musick, 509 P.2d 497, 509 (Ca. 1973) ("Topless" waitresses, who mingle with customers, may stimulate breaches of peace amongst a bar's largely male clientele. Tawdry establishments featuring nudity as a commercial exhibition and sales promotion may be detrimental to the general welfare of the surrounding community."); and see Yauch, 514 P.2d at 711.

See also American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325-29 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) ("Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. . . . Therefore, we accept the premise of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." (citing to Catherine A. MacKinnon, Pornography, Civil Rights and Speech, 20 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 1, 21 (1985)).).

legislation was simply a moral one: "The State's position, therefore, distills down the assertion that nude dancing is distasteful and/or morally repugnant." Miller, 904 F.2d at 1086. As demonstrated above, this is not the case. However, assuming for argument's sake that Indiana's statute was based only on a concern for public morality, this Court has recognized that interest as a legitimate concern for state regulation. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973), the Court stated:

> In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' Roth v. United States, 354 U.S. at 485.

Again, in Bowers v. Hardwick, 478 U.S. 186, 196 (1986), the Court indicated that laws could be based on notions of morality and tradition:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if the laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

In Bowers the Court stressed that the proscriptions against sodomy had ancient roots, that sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when the First Amendment was adopted.

Id. at 192. The same can be said about

the public nudity statute at issue in this case, i.e., that it has ancient roots, was a common law offense, and near universal statutory proscription. Miller, 904 F.2d at 1108. There is no doubt that the framers of the Constitution and the Bill of Rights did not envision the constitutional protection of public nudity. As a Tennessee court stated so accurately:

> It is a travesty to allow nude and crude public exhibitors of the human body, the privilege of asserting the rights of persons who contribute to society's permanent values and are entitled to First Amendment protection, and to read into a public indecency statute an intent to suppress free speech and expression. This Court is not willing to follow those cases that would recognize defendants' First Amendment claim of overbreadth as valid.

McCoy, 645 S.W.2d at 403.

The Court has also approved the compelling governmental interest of

maintaining a "decent society." As the Court recognized in response to the defendants' argument that any obscene materials used by "consenting adults" were constitutionally protected: "Rights and interest 'other than those of the advocates are involved' . . . there is a 'right of the Nation and of the States to maintain a decent society . . . .'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-60 (1973) (quoting Justice Reed, Breard v. Alexandria, 341 U.S. 622, 642 (1950) and Chief Justice Warren, Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (dissenting opinion)). The Court went on to say:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by

> crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

413 U.S. at 63.

II. THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.

A governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free speech. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Assuming that the "barroom" dancing at issue here is protected "speech" or "expression," content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. 475 U.S. at 47. A regulation is "content-neutral" if it is

justified without reference to the content of the regulated speech. 475 U.S. at 48; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

There is a fundamental difference between statutes that are "content-based" and those that are "content-neutral." "Content-based" statutes focus on, and generally proscribe, certain unlawful speech. For instance, they proscribe the distribution of obscene speech and the possession and dissemination of speech which is child pornography.[13] Such laws are based on objections to the "content" of the speech itself. It is unnecessary for a prosecutor to establish

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13. See, e.g., 18 U.S.C. Section 1464 proscribing the distribution of obscene matter and 18 U.S.C. Section 2251 proscribing the distribution of child pornography. Virtually all states have similar laws.

the harmful effects or consequences of such unlawful speech. Such speech has no protection under the United States Constitution.[14] "Content-based" laws generally seek to eradicate the unlawful and constitutionally unprotected speech.[15]

Time, place and manner regulation is primarily concerned with laws that are "content-neutral." Such laws focus on

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14. Miller v. California, 413 U.S. 15, 23 (1973) ("this much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"); New York v. Ferber, 458 U.S. 747, 753 (1983) ("child pornography . . . [is] a category of material outside the protection of the First Amendment").

15. For example, false advertising, speaking words which amount to a conspiracy or obstruction of justice, sedition, incitement, yelling "FIRE!" in a crowded theatre when there is no fire, using words which constitute a bribe, and committing perjury under oath. See Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

the negative secondary consequences or harmful effects that certain speech and speech-related activities cause. These laws regulate the time, place, and manner of these activities in order to minimize or vitiate the harmful effects.

The Indiana public indecency statute in issue regulates the place and manner of activity. The substantial governmental interests in proscribing public nudity have been discussed previously, they include but are not limited to: preservation of the moral structure; right to a decent society; prevention of sexual assaults and prostitution; and elimination of sexual exploitation of women. The purpose of the Indiana statute is to further these goals by prohibiting public nudity. It has nothing to do with content or speech. Under the facts of this case, the

"dancers" are entitled to express any opinions or ideas they wish (although the record clearly demonstrates that they admit that they were not attempting to convey any message, other than to entertain and to increase the patrons' thirst, as the District Court so found). Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419-21 (N.D. Ind. 1988). The state only requires that they must wear a minimal amount of covering, that is, the manner in which they "dance." Crownover v. Musick, 509 P.2d at 511 ("[W]e do not think it is unreasonable to regulate the form, or manner of the communication." (Emphasis in original.)) Specifically, they may express political, scientific, artistic or prurient messages in their "dance," but they must be at least scantily clad in order to comply with the statute.

This regulation is equally applied to others who might wish to respond. Renton, 475 U.S. at 48-49 ("The ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored, or more controversial views' (Citation omitted).")

Further, these minimal or incidental requirements do not unreasonably limit alternative avenues of communication, nor do they significantly burden First Amendment rights. As the Ninth Circuit stated in Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986), when discussing distance and stage required for barroom dancers:

> While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.

Similarly, the "dancers" message (if any) "may be slightly less effective" wearing scant attire, however, the burden is insignificant. Thus the regulations are reasonable time, place, and manner restrictions that only slightly burden speech.

III. ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.

The United States Supreme Court has recognized the right of cities and states to regulate offensive conduct in public places even though it may involve expressive activity or speech. United States v. O'Brien, 391 U.S. 367 (1968). This important right was acknowledged in Miller v. California, 413 U.S. 15 (1973):

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.

413 U.S. at 26 n.8. Even Justice Douglas acknowledged this in his dissenting opinion in Roth v. United States, 354 U.S. 476 (1957):

> No one would suggest that the First Amendment permits nudity in public places . . . . Government should be concerned with antisocial conduct, not with utterances.

354 U.S. at 512-13. It is also clear that:

> When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

O'Brien, 391 U.S. at 376. Therefore, assuming for the purpose of this argument that nude "barroom dance" involves expression, it does not follow that all

regulation of it is forbidden. Indeed, governmental regulation is permissible if certain conditions are met, as set forth in O'Brien:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

It is proper to analyze this case in light of O'Brien, because "speech" and "nonspeech" are combined in the same course of conduct. Nudity -- the condition or state of being unclothed -- is conduct or activity. Nudity is not protected expression, but conduct, which states have a substantial interest in regulating via its police power.

Koppinger, 248 N.W.2d at 711. However, dance may be classified as a form of expression under some circumstances. O'Day v. King County, 749 P.2d 142 (Wash. 1988); but see Dallas v. Stanglin, 490 U.S. ___, 109 S. Ct. 1591, 104 L. Ed. 2d 19, 25-26 (1989) ("It is possible to find some kernal [sic] of expression in almost every activity a person undertakes - for example, walking down the street, or meeting one's friends at a shopping mall -- but such a kernal [sic] is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons -- coming together to engage in recreational dancing -- is not protected by the First Amendment.").[16] Thus, in

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16. "While the precise sort of dancing at issue in Stanglin was ballroom rather than 'go-go' dancing, it turns (cont'd)

this case, a combination of conduct (nudity) and possible expression ("dancing") exist together and the four-prong test of O'Brien is applicable.

Other courts which have examined similar statutes and ordinances, have used the O'Brien framework of analysis to determine their constitutionality, and all have come to the same conclusion -- that regulation of public nudity is a compelling state interest, within the state's police power, and any restrictions on "speech" are incidental at most. Crownover, 509 P.2d at 511-12;

(No. 16 cont'd)
the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes." Walker v. City of Kansas City, Mo., 911 F.2d 80, 89 (8th Cir. 1990).

Kew, 416 F. Supp. at 1105; and Koppinger, 248 N.W.2d at 711-12. See also State v. Nelson, 178 N.W.2d 434, 440-42 (Ia. 1970) (Where court affirmed an indecent exposure conviction even though "political" speech protesting commercial exploitation of sex was claimed by disrobers.).

Does this regulation, Indiana Code Section 35-45-4-1, satisfy O'Brien? First, (as set forth in Section I(B) of this Brief), there can be no question that "regulation of indecent exposure and of conduct inducing to breaches of the peace are traditional and proper subjects of the police power . . . ." Kew v. Senter, 416 F. Supp. at 1105 (N.D. Tex. 1976). Also, in United States v. Biocic, 730 F. Supp. 1364 (D. Md. 1990), the court found:

> In our system of government, the states and their subdivisions are the repositories of the general police power, which can be utilized to proscribe conduct that the community finds offensive to its sense of decency.

730 F.2d at 1366. This is the underlying authority on which the entire line of obscenity cases has been upheld. Cf. Miller v. California, 413 U.S. 15 (1973).

Nor can their be serious debate concerning the governmental interest at issue here. (See, Section 1(C) of Brief.) Certainly this regulation furthers an important or substantial governmental interest -- indeed, interests (in that they are numerous and well-established).

The third part of the O'Brien test is whether the governmental interest is unrelated to the suppression of free expression. O'Brien, 391 U.S. at 377. Clearly, the Indiana "public indecency"

statute is unrelated to speech or its suppression. The regulation is aimed at conduct -- public nudity -- not speech. Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

Finally, the restriction, if any, on First Amendment freedoms caused by this prohibition against public nudity is incidental and no greater than is essential to the furtherance of Indiana's legitimate interests. Not all nudity is proscribed, simply public nudity. The "actor" remains free to speak and express him or herself freely, but he or she "cannot appear with genitals or breasts exposed" while doing so. Crownover v. Musick, 509 P.2d at 512. Therefore the statute meets the requisite condition of O'Brien and is constitutionally valid.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Indiana Supreme Court previously held this statute constitutional in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979). The facts in that case are almost identical to the ones at bar. Defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. 397 N.E.2d at 583. The Court responded:

> Under out statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates

to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction of nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and

> standards to be used in a determination of obscenity when required for different materials or performers.

397 N.E.2d at 587 (emphasis added). Thus the court held, in light of the facts before them, that this type of "barroom" dancing was not constitutionally protected. However, the court recognized that under certain other facts, nudity in public might be constitutionally protected expression. Again, the facts in Baysinger are identical to the facts of the present case.

Baysinger, by itself, only has precedential value for Indiana courts. However, on May 12, 1980, this Court dismissed the Baysinger appeal for want of a substantial federal question. State v. Baysinger, et al., sub nom. Clark v. Indiana, 446 U.S. 931 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975),

a dismissal of an appeal from a state court upholding a state statute against federal constitutional attack, for want of a substantial federal question, is a ruling on the merits, with precedential force for all courts except the Supreme Court itself. Although the Seventh Circuit did not feel bound by precedent, other courts have felt obligated to follow Baysinger. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983); Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980); and Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981).

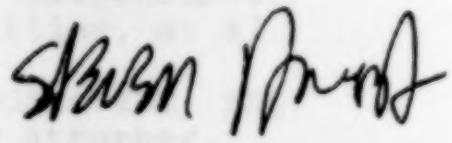
Rather than speculating how the Supreme Court would rule on this issue the Court of Appeals should have followed the precedent already established by Baysinger and Hicks.

CONCLUSION

For the foregoing reasons, Amici support the petitioners in this matter.

Respectfully submitted,

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